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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 865

MARITIME CARRIERS CORPORATION,

Petitioner,

against

HENRY H. FOWLER, individually, and as Secretary of the Treasury, LAURAN D. JOHNSON, individually, and as Commissioner of Customs, ALAN STEPHENSON BOYD, individually, and as Secretary of the Department of Transportation, WILLARD J. SMITH, individually, and as Commandant of U. S. Coast Guard, and the BUREAU OF CUSTOMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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§ 252 15

§ 861 14

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MARINE CARRIERS CORPORATION,

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HENRY H. FOWLER, individually, and as Secretary of the Treasury, LESTER D. JOHNSON, individually, and as Commissioner of Customs, ALAN STURTEVANT BOYD, individually, and as Secretary of the Department of Transportation, WILLARD J. SMITH, individually, and as Commandant of U. S. Coast Guard, and the BUREAU OF CUSTOMS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Marine Carriers Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 1, 1970.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit and the opinion of the United States

District Court for the Southern District of New York, which is reported at 305 F. Supp. 984 (S.D.N.Y. 1969), as well as the letters of the Bureau of Customs and the Treasury Department which constitute the administrative rulings herein, appear in the Appendix hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 1, 1970. On July 14, 1970 American Tramp Shipowners Association, *et al.*, as *amici curiae*, filed a motion for leave to file a petition for rehearing. Also on July 14, 1970, respondents, as appellants in the Court of Appeals, filed a motion for extension of time to file a petition for rehearing. On July 20, 1970 the Court of Appeals filed an order granting the motion of American Tramp Shipowners Association, *et al.* for leave to file a petition for rehearing. Also on July 20, 1970 an order of the Court of Appeals was filed granting respondents' motion for an extension of time to file a petition for rehearing. On July 21, 1970 American Tramp Shipowners Association, *et al.*, as *amici curiae*, filed a petition for rehearing. On July 21, 1970 American Trading and Production Corporation filed a motion for leave to file a petition for rehearing as *amicus curiae*. On July 21, 1970 respondents filed their petition for rehearing. On July 27, 1970 an order was filed denying respondents' petition for rehearing. On July 27, 1970 an order was filed in the Court of Appeals granting leave to American Trading and Production Corporation as *amicus curiae* to file a petition for rehearing. On July 31, 1970 American Trading and Production Corporation filed its petition for rehearing. On August 13, 1970 an order was filed in the Court of Appeals denying the petition for rehearing by American Trading and Production Corporation as *amicus curiae*. This petition was filed within 90 days of July 1, 1970, excluding the time during which the petitions for rehearing were pend-

ing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is the S. S. Observer, a United States flag vessel wholly owned by a United States citizen, which was rebuilt in a United States shipyard and all component parts of which were constructed in United States shipyards, entitled to engage in the coastwise trade?

2. Does the fact that the forebody of the Observer was originally the forebody of a previously existing vessel named the Wapello, which latter vessel had been constructed in a United States shipyard but for a foreign corporation, deprive the Observer of coastwise privileges as a consequence of the first proviso of Section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883?

Statutory Provisions Involved

United States Code, Title 46:

§ 11. Vessels entitled to registry; coastwise trade; ocean mail service contracts.

Vessels built within the United States and belonging wholly to citizens thereof; and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States; and seagoing vessels, whether steam or sail, which have been certified by the Coast Guard as safe to carry dry and perishable cargo, wherever built, which are to engage only in trade with foreign countries, with the Islands of Guam, Tutuila, Wake, Midway, and Kingman Reef, lying wholly owned by citizens of the United States or corporations organized

and chartered under the laws of the United States, or of any State thereof, of which the president or other chief executive officer and the chairman of the board of directors shall be citizens of the United States and no more of its directors than a minority of the number necessary to constitute a quorum shall be noncitizens, and no others, may be registered as directed in this chapter and chapters 3, 4, 5, 6, 7, 8, and 9 of this title. Foreign-built vessels registered pursuant to this section shall not engage in the coastwise trade: *Provided*, That such vessels so admitted under the provisions of this section may contract with the Postmaster General under Act March 3, 1891, c. 519, 26 Stat. 830, so long as such vessels shall in all respects comply with the provisions and requirements of said sections. As amended Sept. 21, 1959, Pub. L. 86-327, § 1, 73 Stat. 597.

§13. Foreign-built vessels admitted to American registry; coastwise trade

All foreign-built vessels admitted to American registry, owned on February 1, 1920, by persons citizens of the United States, and all foreign-built vessels owned by the United States on June 5, 1920, when sold and owned by persons citizens of the United States, may engage in the coastwise trade so long as they continue in such ownership, subject to the rules and regulations of such trade. June 5, 1920, c. 250, § 22, 41 Stat. 997.

§ 251. Vessels entitled to privileges of vessels employed in coasting trade or fisheries; landing of catch of fish by foreign-flag vessels; sale or transfer for immediate consumption; forfeitures and penalties

(a) Vessels of twenty tons and upward, enrolled in pursuance of sections 251-255, 258, 259, 262-280, 293,

306-316, 318, 321-330 and 353-335 of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by such sections, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries. Except as otherwise provided by treaty or convention to which the United States is a party, no foreign-flag vessel shall, whether documented as a cargo vessel or otherwise, land in a port of the United States its catch of fish taken on board such vessels on the high seas or fish products processed therefrom, or any fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products.

• • •

§ 252. Vessels which may be enrolled

In order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel; and the same powers and duties are conferred and imposed upon all offices, respectively, and the same proceedings shall be had, in enrollment of vessels, as are prescribed for similar cases in registering; and vessels enrolled, with the masters or owners thereof, shall be subject to the same requirements as are prescribed for registered vessels. R.S. § 4312.

§ 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade

Any vessel purchased, chartered, or leased from the Secretary of Commerce, by persons who are citizens of the United States, may be registered or enrolled and

licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the Secretary to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

* * *

§ 883. Transportation of merchandise between points in United States in other than domestic-built or rebuilt and documented vessels

No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: *Provided*, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade: *Provided further*, That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coast-

wise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions: *Provided further,* That this section shall not apply to merchandise transported between points within the continental United States, including Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further,* That this section shall not become effective upon the Yukon River until the Alaska Railroad shall be completed and the Secretary of Commerce shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic: *Provided further,* That this section shall not apply to the transportation of merchandise loaded on railway cars or to motor vehicles with or without trailers, and with their passengers or contents when accompanied by the operator thereof, when such railroad cars or motor vehicles are transported in any railroad car ferry operated between fixed termini on the Great Lakes as a part of a rail route, if such car ferry is owned by a common carrier by water and operated as part of a rail route with the approval of the Interstate Commerce Commission, and if the stock of such common carrier by water, or its predecessor, was owned or controlled by a common carrier by rail prior to June 5, 1920, and if the stock of the common carrier

owning such car ferry is, with the approval of the Interstate Commerce Commission, now owned or controlled by any common carrier by rail and if such car ferry is built and documented under laws of the United States: *Provided further*, That upon such terms and conditions as the Secretary of the Treasury by regulation may prescribe, and, if the transporting vessel is of foreign registry, upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that the government of the nation of registry extends reciprocal privileges to vessels of the United States, this section shall not apply to the transportation by vessels of the United States not qualified to engage in the coastwise trade, or by vessels of foreign registry, of (a) empty cargo vans, empty lift vans, and empty shipping tanks; (b) equipment for use with cargo vans, lift vans, or shipping tanks, (c) empty barges specifically designed for carriage aboard a vessel, and (d) any empty instrument for international traffic exempted from application of the customs laws by the Secretary of the Treasury pursuant to the provisions of section 1322(a) of Title 19, if the articles described in clauses (a) through (d) are owned or leased by the owner or operator of the transporting vessel and are transported for his use in handling his cargo in foreign trade; and (e) stevedoring equipment and material, if such equipment and material is owned or leased by the owner or operator of the transporting vessel, or is owned or leased by the stevedoring company contracting for the lading or unlading of that vessel, and is transported without charge for use in the handling of cargo in foreign trade. June 5, 1920, c. 250, § 27, 41 Stat. 998, amended Ex. Ord. No. 6166, § 12, June 10, 1933; Apr. 11, 1935, c. 58, 49 Stat. 154; July 2, 1935, c. 355, § 1, 49 Stat.

442; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 204, 206, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1276, 1277; July 14, 1956, c. 600 § 1, 70 Stat. 544; July 7, 1958, Pub. L. 85-508, § 27 (a), 72 Stat. 351; July 5, 1960, Pub. L. 86-583, § 1, 74 Stat. 321; Sept. 21, 1965, Pub. L. 89-194, 79 Stat. 823; Aug. 11, 1968, Pub. L. 90-474, 82 Stat. 700.

Statement of the Case

Petitioner, Marine Carriers Corporation, is a Delaware corporation and a United States citizen within the meaning of the relevant statutes. The petitioner is the owner of the vessel OBSERVER, which vessel is a United States flag vessel having been registered by the Bureau of Customs, Department of the Treasury on October 13, 1966, and assigned Official Number 505883.

The OBSERVER, as said vessel presently exists, and as she existed at the time of her registration under the United States flag, was a new creation resulting from the joinder of the stern section (having all of the engines and propelling machinery) of a vessel known during her existence as the TRUSTCO, with the forebody (essentially the cargo hold) of another vessel.

The TRUSTCO had also been owned by petitioner and had been documented under the laws and flag of the United States and enrolled with the right to engage in the coastwise trade. All of the work incidental to the creation of the OBSERVER was done in a United States shipyard.

The cargo carrying section or forebody of the OBSERVER had originally been the forebody of a tanker known during its existence as the WAPELLO, a vessel which was built in a United States shipyard for a Panamanian corporation, and which was delivered to her foreign owner and regis-

tered under foreign flag immediately upon completion of construction.

Subsequently, the WAPELLO was cut and the forebody sold to a foreign corporation which caused it to be joined to the stern section of a vessel previously known as the ESSO CHITTAGONG. Such joinder resulted in the creation of a tanker vessel which was thereupon named the SANTA HELENA and registered under Liberian flag.

Subsequently, petitioner acquired the forebody of the SANTA HELENA with the approval of the United States Maritime Administration and caused the forebody of the TRUSTCO to be removed and thereupon caused the forebody of the SANTA HELENA (previously the forebody of the WAPELLO) to be joined to the stern section of the TRUSTCO so as to create a new vessel, namely, the S. S. OBSERVER.

Prior to contracting for the purchase of the forebody of the SANTA HELENA, petitioner made application to the United States Maritime Administration for a ruling as to whether or not the vessel OBSERVER, upon completion of her reconstruction, would be considered a privately owned United States flag commercial vessel within the meaning of Section 901(b) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1241(b). In reply the petitioner received a letter dated June 1, 1966 from the United States Department of Commerce, Maritime Administration, by its General Counsel, which letter stated, in part, as follows:

> ". . . The vessel which you propose to create and rebuild in the United States by joining the forebody of the SANTA HELENA to the stern of the TRUSTCO will not be a vessel built outside the United States, it will not be a vessel rebuilt outside the United States, and it will not be a vessel documented under a foreign registry. The resulting vessel will be a vessel rebuilt in the United States and, if you immediately document

it under the laws of the United States, its first registration or documentation will be its documentation under the laws of the United States."

On August 1, 1966, the petitioner, by its counsel, solicited a ruling from the Bureau of Customs of the Department of the Treasury confirming that the vessel OBSERVER, upon completion of her rebuilding, would qualify for enrollment and license under the United States flag, with coastwise privileges.

On October 5, 1966, Lester D. Johnson, the Commissioner of Customs, replied by letter in which he stated that the first proviso to § 883, Title 46, United States Code,

> ". . . specifies two methods by which a vessel may have acquired the right to engage in the coastwise trade, and certain events, a sale foreign or the placing of the vessel under foreign registry, which, should either occur, would preclude the vessel from thereafter acquiring the right to engage in the coastwise trade. Applying the proviso to the facts submitted, the WAPELLO acquired the right to engage in the coastwise trade by having been built in the United States and lost that right when it was later placed under foreign registry."

The letter concluded with the advice that:

> ". . . Accordingly, the resulting vessel comprised of a portion of the SANTA HELENA and the TRUSTCO will not be eligible to engage in the coastwise trade since a portion of the resulting vessel has lost its right to engage in the coastwise trade." (A-46-47)

On October 14, 1966 counsel for the petitioner wrote to the Secretary of the Treasury soliciting a review of the ruling made by the Commissioner of Customs as set forth in the latter's letter of October 5, 1966. It was pointed

out that the Commissioner's ruling had been based on the premise that the forebody of the WAPELLO had been eligible, under authority of the first proviso to 46 U.S.C. § 883, to engage in coastwise trade because it was built in the United States, and it was submitted that the statute in question does not establish the eligibility of a vessel to engage in coastwise trade. It further was pointed out that in order for a vessel to have a lawful right to engage in the coastwise trade it must be owned by a citizen of the United States within the meaning of the Shipping Act and the WAPELLO was never so owned. The letter consequently pointed out that the Commissioner had misplaced reliance on the statute as a ground for depriving the OBSERVER of the right to engage in coastwise trade, and requested a considered review of the ruling.

By letter dated October 27, 1966 the Treasury Department replied, confirming the Commissioner's conclusion (A-48).

On November 22, 1966, the petitioner, by its counsel, again wrote to the Treasury Department soliciting a reconsideration of the latter's review of the Commissioner's conclusion, and set forth the reasons why it was felt that the Commissioner was in error.

By letter dated December 19, 1966, the Treasury Department replied affirming its previous ruling to the effect that the OBSERVER was not eligible to engage in the coastwise trade (A-50). Suit was thereupon commenced by the petitioner for a judgment declaring that the Government's refusal to document and enroll the OBSERVER was erroneous, improper and unlawful and further ordering the Government to document and enroll the said vessel.

Thereafter, both parties moved for summary judgment, and statements pursuant to Rule 9g of the General Rules of the United States District Court for the Southern District of New York were filed by the parties stipulating the essential facts.

By opinion dated and filed October 21, 1969 the petitioner's motion for summary judgment was granted and the Government's corresponding motion was denied (A-36).

The Government appealed from the order of the United States District Court for the Southern District of New York to the United States Court of Appeals for the Second Circuit. The following parties appeared as *amici curiae* in the Court of Appeals in support of the Government's position that the decision of the District Court should be reversed: American Trading and Production Corporation; American Tramp Shipowners Association, Shipbuilders Council of America; Bethlehem Steel Corporation, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, International Brotherhood of Boilermakers Iron Ship Builders Blacksmiths Forgers and Helpers, AFL-CIO, Overseas Bulk Ships, Inc., Hudson Waterways Corporation, Penn Shipping Company, Inc., and Ogden Marine, Inc.

By an opinion dated and filed on July 1, 1970 the Court of Appeals reversed the decision of the District Court and remanded the case to the District Court for a trial on the issue of whether the OBSERVER is to be considered the rebuilt TRUSTCO or the rebuilt SANTA HELENA (A-27).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is contrary to basic rules of statutory construction, involves a novel and important question concerning the interpretation of a federal statute, seriously affects the administration of the Merchant Marine Act of 1920 and has a substantial impact on the American Merchant Marine.

Petitioner seeks this writ of certiorari to review the decision of the Court of Appeals because said decision raises novel and important questions as to the interpretation of

an important federal statute, the Merchant Marine Act of 1920, 46 U.S.C. §§ 861 *et seq.* The importance of the Merchant Marine Act of 1920 is underscored in Section 1 of said Act, 46 U.S.C. § 861, wherein the purpose and policy of the act is set forth.

The decision sought to be reviewed hereby construed § 27 of the Act, 46 U.S.C. § 883, in such a way as to deprive an American flag vessel of the right to engage in the coastwise trade. Said decision, and the statutory interpretation on which it rests, not only has an important and serious economic effect on the American owners of said vessel, but may also affect the rights of other owners of American flag vessels.

The decision of the Court of Appeals found that the [illegible], an American flag vessel, is deprived of the right to engage in the coastwise trade by the first proviso of 46 U.S.C. § 883. The proviso in question, although an important one in the administration of the American Merchant Marine, has never before been passed upon by this Court or by any other Court of Appeals. The construction given to the statute by the Court of Appeals is one which has and will have a continuous and important effect upon the administration of the Merchant Marine Act of 1920 with regard to coastwise trading privileges. Even more important, it will have a substantial impact upon the American Merchant Marine at a time when its future is a matter of grave national concern.

It is respectfully submitted that the decision of the Court of Appeals is erroneous and contrary to the basic rules of statutory construction as established by this Court.

The section which deals generally with the right of a vessel to be documented under the laws of the United States is 46 U.S.C. § 11. That section specifies the elements of eligibility and prescribes at the very outset that only "Vessels built within the United States and belonging to

citizens thereof" may be registered as a vessel of the United States. In 46 U.S.C. § 252, it is prescribed that a vessel must meet the same requirements for enrollment as are prescribed for her to be registered. If vessels qualify for enrollment, then, as is set forth in 46 U.S.C. § 251, such vessels "shall be deemed vessels of the United States entitled to privileges of vessels employed in the coastwise trade or fisheries".

There is no question that the Onsanvan meets the requirements of the above cited sections in that it was built in the United States and is owned by American citizens. Therefore, the Onsanvan is entitled to coastwise trading privileges unless it is deprived of those privileges by some other statutory provision.

The Court of Appeals held that the Onsanvan was deprived of coastwise trading privileges by the first proviso of 46 U.S.C. § 883. The pertinent portion of that section reads as follows:

> "No merchandise shall be transported by water, . . . between points in the United States, . . . in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: *Provided*, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade: . . ."

It is clear from the language of said proviso that it applies only to vessels which had acquired the right to engage in the coastwise trade and were subsequently sold

foreign. As was shown above, in order to acquire the lawful right to engage in coastwise trading, a vessel must have been built in the United States and owned by United States citizens.

The forebody of the OBSERVER (previously the forebody of the WAPELLO) was built in the United States, but it was built for and delivered to a foreign corporation and therefore never acquired the right to engage in the coastwise trade. This was the holding of the United States District Court for the Southern District of New York which found, therefore, that the OBSERVER was not excluded from coastwise trading privileges by the above quoted proviso even though its forebody was previously the forebody of the WAPELLO.

The Court of Appeals, however, found an inconsistency between two phrases of the first proviso. The first phrase ("any vessel having at any time acquired the lawful right to engage in the coastwise trade"), the Court of Appeals said, seems to suggest that the proviso applies only to those vessels sold foreign after having acquired the full legal right to engage in the coastwise trade. The second phrase ("either by virtue of having been built in, or documented under the laws of the United States"), the Court of Appeals said, seems to suggest that the proviso applies to all vessels built in the United States.

It is respectfully submitted that there is no inconsistency whatever between the two phrases. The second phrase is merely an appositive one, included to clarify the operative first phrase. It simply recognizes that, under the statutory scheme established by Congress, it is possible for a vessel to obtain coastwise trading privileges even though not built in the United States.

In general, a vessel must be built in the United States to be eligible to engage in the coastwise trade. 46 U.S.C. §§ 11, 251-252. However, there are two exceptions.

46 U.S.C. § 13 and 46 U.S.C. § 808 allow a vessel not built in the United States to engage in the coastwise trade under certain conditions specified therein. It is this possibility which the second phrase was intended to clarify.

The clause immediately preceding the first proviso reads as follows:

> ". . . in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: . . ."

Comparing the language of the above quoted clause with that of the appositive phrase, it is clear that the appositive phrase was included for one reason only. That reason was to make absolutely certain that the prohibition of the proviso would apply to vessels which acquire the lawful right to engage in the coastwise trade under Sections 13 and 808 as well as those which acquire the right by the normal method as set out in Sections 11, 251-252. What is not changed is that in order to acquire the lawful right to engage in the coastwise trade a vessel built in the United States must be American owned and that the proviso only applies to vessels which had acquired that right. The appositive phrase does not change the basic requirement of American ownership, nor does it make the proviso applicable to vessels which never acquired the lawful right to engage in the coastwise trade. It is included simply to clarify the point that a vessel may acquire the lawful right to engage in the coastwise trade either by virtue of Sections 251-252 ("built in" the United States) or Sections 13 and 808 ("documented under" the laws of the United States).

The Court of Appeals in an effort to resolve what it felt was a conflict between the two phrases resorted to the device of a "conditional" right to engage in the coastwise

trade. It recognized that American ownership is essential to the right to engage in coastwise trade and that the WAPELLO was never American owned. The Court of Appeals found, however, that the WAPELLO, having been built in the United States, acquired a "conditional" right to coastwise trading privileges, specifically, a right conditioned upon the vessel's ownership by a United States citizen.

The Court of Appeals, as a result of assuming the existence of a conditional right, reached the conclusion that although the WAPELLO did not have a "full legal right" to engage in the coastwise trade, it nevertheless had a "lawful right" within the meaning of the statute, and, having been built for and delivered to a foreign corporation, was, therefore, barred by the first proviso.

It is respectfully submitted that there exists no basis either in the Merchant Marine Act or in logic for the use of a "conditional right" concept to deprive the OBSERVER of coastwise privileges. The words of the statute are clear and unambiguous. When read as a whole, each word and phrase can be given its complete and intended meaning without resorting to a "conditional right" device. The statute is one which would deprive American citizens of their common law rights and should, therefore, be strictly construed. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *American Direct Telegraph Co.* v. *Kittleson*, 179 F. 2d 946 (8th Cir., 1950); *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883 (3rd Cir., 1954), aff'd 350 U. S. 332 (1956); *Sierra Pacific Power Co.* v. *Federal Power Commission*, 223 F. 2d 605 (D. C. Cir., 1955). It is respectfully submitted that the construction imposed by the Court of Appeals is not in keeping with this rule of statutory interpretation.

Nor, is there any basis for the concept of a "conditional right" in logic. It is clear that even if the WAPELLO did acquire a "conditional right" to engage in the coastwise trade, it could not acquire the "lawful right" to do so

until said condition was fulfilled, the condition being American ownership. It follows that until the WAPELLO was owned by a United States citizen it could not acquire the "lawful right" to engage in the coastwise trade. Neither the WAPELLO, nor any part thereof, was ever owned by an American citizen until its forebody was purchased by the petitioner, at which time the application for coastwise trading privileges was made.

The Court of Appeals, in reaching its decision, also relied on the legislative history of the statute. S. Rep. No. 870, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 118, 74th Cong., 1st Sess. (1935).

It is respectfully submitted that in resorting to the legislative history the Court of Appeals violated another basic rule of statutory construction. It was unnecessary to resort to the legislative history as an aid to interpret the statute since, as was found by the District Court, the statute is unambiguous. *Ex Parte Collett*, 337 U. S. 55 (1949); *Haskell* v. *United States*, 241 F. 2d 790 (10 Cir. 1957); *Elm City Broadcasting Corporation* v. *United States*, 235 F. 2d 811 (D. C. Cir. 1956); *Welch* v. *W. J. Dillner Transfer Co.*, 91 F. Supp. 685 (1950).

The only ambiguity which arose was as a result of the Court of Appeals' erroneous constuction of the second phrase of the first proviso. If that phrase is correctly interpreted, in light of 46 U.S.C. § 13 and § 808, any apparent ambiguity vanishes.

In summary, petitioner submits that the first proviso to 46 U.S.C. § 883 applies only to vessels which had acquired the lawful right to engage in the coastwise trade and subsequently lost that right by being sold foreign. It is clear that no vessel can acquire the lawful right to engage in the coastwise trade unless it is American owned. The forebody of the WAPELLO, which ultimately became the forebody of the OBSERVER, was never owned by an American citizen

and therefore could not have acquired the lawful right to engage in the coastwise trade. It is respectfully submitted that the WAPELLO and *a fortiori* the OBSERVER cannot be barred from coastwise trading privileges by 46 U.S.C. § 883.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOSEPH CARDILLO, JR.,
Counsel for Petitioner,
29 Broadway,
New York, New York 10006.

APPENDIX A

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 839—September Term, 1969.

(Argued June 3, 1970 Decided July 1, 1970.)

Docket No. 34547

MARINE CARRIERS CORPORATION,

Appellee,

v.

HENRY H. FOWLER, individually, and as SECRETARY OF THE TREASURY, LESTER D. JOHNSON, individually, and as COMMISSIONER OF CUSTOMS, ALAN STEPHENSON BOYD, individually, and as SECRETARY OF DEPARTMENT OF TRANSPORTATION, WILLARD J. SMITH, individually, and as COMMANDANT OF U. S. COAST GUARD, and the BUREAU OF CUSTOMS,

Appellants.

Before:

LUMBARD, *Chief Judge*,
SMITH and KAUFMAN, *Circuit Judges*.

Appeal from an order and judgment of the United States District Court for the Southern District of New York,

Appendix A

Charles H. Tenney, *Judge*, granting plaintiff's and denying defendants' motion for summary judgment.

Reversed and remanded.

RICHARD M. HALL, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney, New York, N. Y.; Patricia M. Hynes, Assistant United States Attorney, on the brief), *for Appellants Fowler, et al.*

JOSEPH CARDILLO, JR., New York, N. Y. (Robert V. Corbett, John P. Cardillo, Cardillo & Corbett, New York, N. Y., on the brief), *for Appellee Marine Carriers Corporation.*

ELKAN TURK, JR., New York, N. Y. Burlingham Underwood Wright White & Lord, New York, N. Y.), *submitted brief for Amicus Curiae American Trading and Production Corporation.*

RAYMOND J. BURKE, THOMAS A. DILLON, New York, N. Y. (Burke & Parsons, New York, N. Y., Marvin J. Coles, Coles & Goertner, Washington, D. C.), *submitted brief for Amici Curiae American Tramp Steamers Association, et al.*

KAUFMAN, *Circuit Judge:*

Like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve. In order to participate in this trade, a vessel's credentials must be thoroughly American. The ship must

have been built in an American shipyard and be owned by American citizens. Moreover, it must not have trifled with its American heritage.

Under the first proviso to section 27 of the Merchant Marine Act of 1920, the statute we are required to construe in this case, any vessel which has acquired "the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States," and which has later lost that right by being sold to a foreign owner, is prohibited from ever regaining its eligibility for the coastwise trade.

I. *Facts*

The OBSERVER, the vessel whose eligibility for the coastwise trade we must adjudicate in this case, is the issue of a marriage of convenience—and as occasionally happens with such marriages, the lineage is difficult to determine. In this case, the end product is the result of "jumboizing," a process whereby the stern of one oil tanker is attached to the forebody of another in order to produce a tanker with a greater carrying capacity.

The OBSERVER's ancestry begins with the tanker WAPELLO, a vessel constructed in 1953 in an American shipyard for Panamanian owners and placed under Panamanian registry. Some years later the WAPELLO was dismembered, and in a Japanese shipyard its forebody was joined to the stern of the tanker ESSO CHITTAGONG, an American built vessel which was later sold to a foreign owner and registered Panamanian. The product of this coupling became known as the SANTA HELENA, and was placed under Liberian registry. But the SANTA HELENA was to be no more than a way station for the old forebody of the WAPELLO. In 1966 the SANTA HELENA's forebody (previously the forebody of the WAPELLO), was sold to Marine Carriers, who then proceeded to attach it to the stern of the TRUSTCO, a vessel

built in America in 1943, American owned ever since that date, and enrolled in the coastwise trade. The connection took place in an American shipyard, and the progeny was named the OBSERVER. The OBSERVER's forebody, which, as we have noted, was the forebody of the WAPELLO, comprises three-quarters of its total length. On the other hand, its stern, formerly the stern of the TRUSTCO, apparently is far more valuable than the forepart.

Before contracting for the purchase of the forebody of the SANTA HELENA, Marine Carriers commenced negotiations with various administrative agencies for appropriate documentation of the OBSERVER as an American vessel. The shipping laws provide for two basic types of documentation: registration and enrollment. Registration entitles a vessel to engage in foreign trade; enrollment is a prerequisite for participation in coastwise trade. See 46 U.S.C. §§ 11, 252. In April 1966, Marine Carriers inquired of the United States Maritime Administration whether the OBSERVER would be considered a privately owned American flag vessel and was advised that the OBSERVER "will be a vessel rebuilt in the United States." In October 1966, however, in response to renewed inquiries by Marine Carriers, the Commissioner of Customs ruled that the OBSERVER would be ineligible for the coastwise trade. The basis for the Commissioner's ruling was that the OBSERVER's forebody had formerly been the forebody of the WAPELLO, a ship which, under his interpretation of the first proviso to section 27, had forfeited the right to engage in the coastwise trade by having been built in the United States and later sold to a foreign owner.

When the joining of the stern of the TRUSTCO and the forebody of the SANATA HELENA, nee WAPELLO, to the OBSERVER had been completed, Marine Carriers applied to the Bureau of Customs for registration of the OBSERVER as an American ship. Since registration merely requires that a ship be owned by United States citizens, *see* 46 U.S.C. § 11,

the Bureau issued a temporary Certificate of Registry and a new registration number to the OBSERVER. The Certificate of Registry recited that the OBSERVER was a rebuilt ship which had originally been built in the year 1943, the year of the TRUSTCO's construction.

What Marine Carriers really desired to secure for the OBSERVER, however, was not merely registration as an American vessel but also enrollment in the coastwise trade. Accordingly, it petitioned the Secretary of the Treasury to review the determination of the Commissioner of Customs that the OBSERVER was ineligible for enrollment. The Treasury replied that it had carefully considered the issues involved and agreed with the decision of the Commissioner. A request for rehearing proved equally unavailing.

Having exhausted all possible avenues of administrative relief, Marine Carriers commenced this action in the Southern District of New York in October 1967, seeking a declaratory judgment that the OBSERVER was entitled to enrollment in the coastwise trade and an injunction ordering those who had excluded the OBSERVER to approve her enrollment. Having submitted affidavits and exhibits, both the plaintiff and the defendants moved for summary judgment. Judge Tenney granted the motion of Marine Carriers and ordered the defendants to approve the OBSERVER's application for coastwise trading privileges.

II. *The Decision Below—Eligibility of the* WAPELLO *for the Coastwise Trade*

Due to the OBSERVER's somewhat peculiar and involved origins, troublesome and potentially material issues of fact abounded in this case at the time the parties moved for summary judgment. Should the OBSERVER be characterized as an entirely new ship, as a rebuilt TRUSTCO or as a rebuilt SANTA HELENA? Under one view of the law, however, all of

these issues were immaterial. The OBSERVER, as we have stated, was constructed in an American shipyard from the forebody of the WAPELLO and the stern of the TRUSTCO. The TRUSTCO's eligibility for coastwise trade was not subject to question; it was, in fact, enrolled in this trade. If the WAPELLO, and *a fortiori* its forebody, were also eligible, it would follow that the OBSERVER, however it may be characterized, was entitled to coastwise trading privileges. The district court opted for this view and concluded that the WAPELLO was eligible for the coastwise trade and, accordingly, granted Marine Carriers' motion for summary judgment. Only if this conclusion is correct may we avoid the knotty factual issues lurking in this case and uphold the grant of summary judgment. Accordingly, the first issue we proceed to discuss is the WAPELLO's eligibility for the coastwise trade. In order to achieve some clarity in this complex case, we shall assume that Marine Carriers purchased not just the forebody of the WAPELLO but the entire vessel. Obviously, there can be no objection to the admission of the WAPELLO's forebody to the coastwise trade if the entire vessel were entitled to be admitted.

To be admitted to the coastwise trade, a vessel must meet two basic requirements: it must have been built in an American shipyard and it must be owned by American citizens.[1] 46 U.S.C. §§ 11, 252. The WAPELLO was constructed in an American yard in 1943. Its purchase by Marine Carriers, an American-owned corporation, in 1966, placed it under American ownership. Thus, upon its purchase by Marine Carriers, the WAPELLO would have met the

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[1] There are two exceptions, not relevant here, to the general rule that a vessel must have been built in the United States and owned by an American to be enrolled in the coastwise trade. Foreign-built vessels owned by Americans and registered American on February 1, 1920 may be enrolled, as may vessels owned by the United States on June 5, 1920. 46 U.S.C. § 13. Vessels sold, chartered, or leased by the Secretary of Commerce, without regard to where they were built, are also eligible for enrollment. 46 U.S.C. § 808.

basic prerequisites for enrollment in the coastwise trade. Section 27 of the Merchant Marine Act of 1920 does not alter these basic requirements.[3] 46 U.S.C. § 883. A proviso added to this section in 1935 (hereinafter the first proviso), however, provided that certain vessels, although American-built and American-owned, were nevertheless disqualified from engaging in the coastwise trade. Act of July 2, 1935, ch. 355, 49 Stat. 442. Specifically, this proviso seems to exclude from coastwise trade vessels built in the United States, then sold foreign, and later reacquired by American owners. The import of the statute is that once the right to engage in coastwise trade was forfeited by reason of foreign ownership, that right could not be regained.

The principal obstacle to determining the applicability of this statute to the WAPELLO arises from its rather inartful wording. Since the proper interpretation of this language is the focus of dispute in this case, we quote the proviso in full. It states:

> "That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States and later sold foreign in

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[3] The introductory portion of section 27, as amended 46 U.S.C. § 883, reads:

> "No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege to engage in the coastwise trade is extended by section 13 or 808 of this title. . . ."

Section 27, as amended 46 U.S.C. § 883, also contains six provisos, two of which (the first and the second) are relevant to this appeal. The first is quoted in the text; the second, in note 6.

whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade."

The difficulty in interpreting this langauge is compounded by the need to reconcile two phrases which it is argued are inconsistent. The first phrase seems to suggest that the proviso applies only to those vessels sold foreign after having acquired the full legal right to engage in the coastwise trade; the second phrase, that it applies to all vessels sold foreign after having been built in the United States. The alleged inconsistency between these two phrases arises from the statutory requirement to which we have already alluded: that to acquire the full legal right to engage in the coastwise trade, a vessel must not only have been built in the United States, it must also be owned by citizens of the United States. *See* 46 U.S.C. §§ 11, 252. Marine Carriers argues vociferously that the first phrase is the operative language of the proviso. It says that the WAPELLO had not been American-owned before being sold Panamanian. Accordingly, it had not at that time "acquired the lawful right to engage in the coastwise trade" and, therefore, would not be prevented from acquiring this right upon being returned to American ownership.[3] The appellants in turn direct our attention to the second phrase of the proviso. They insist that the WAPELLO, having been built in the United States, and then sold to Panamanian

[3] The district court accepted Marine Carriers' interpretation of the proviso, dismissing the second phrase as a shorthand means of indicating the routes by which a vessel may acquire "the lawful right to engage in the coastwise trade." The effect of this interpretation is that it leads to the unlikely result of excluding from the coastwise trade vessels built in the United States for Americans and then sold to foreign owners, but including vessels originally built in the United States for foreign owners. Neither the opinion of the district court nor the arguments of Marine Carriers in this court suggest any reason in logic or policy why these two classes of ships should be treated differently.

owners became forever disqualified from participation in the coastwide trade.

In our efforts to resolve an inconsistency of this nature, we are not unmindful of the admonition that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 439 (1935) (Cardozo, *J.*, dissenting). See also *NLRB* v. *Lion Oil Co.*, 352 U. S. 282 (1957) (Frankfurter, *J.*) (a court must "find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that [the legislative body] manifested"); *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956); *United States* v. *Menasche*, 348 U. S. 528 (1955); *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939). Reading the two allegedly inconsistent clauses *in pari materia*, we discern one interpretation which would make the statute's language "comprehensible." It appears that if the vessel is built in the United States, it does not *ipso facto* acquire the full legal right to participate in the coastwise trade. It does, however, acquire a conditional right, specifically, a right conditioned upon the vessel's ownership by a citizen of the United States. If the first phrase of the proviso—"that no vessel having at any time acquired the lawful right to engage in the coastwise trade"—be construed as a reference to this conditional right, any apparent inconsistency between the two phrases vanishes. Since this view gives clarity to an otherwise obfuscated proviso, we are of the view that the WAPELLO "acquired the lawful right to engage in the coastwise trade . . . by virtue of having been built in . . . the United States," that it lost this right by being "sold foreign" to Panamanian owners, and that under the terms of the first proviso to section 27 it could never regain this right.

Appendix A

Consideration of the legislative history of the first proviso reinforces our view that the WAPELLO is ineligible for the coastwise trade. The committee reports in both the Senate and the House of Representatives, indeed, could not have been more specific on this point. Both reports enumerated two classes of vessels which the proviso was intended to exclude from the coastwise trade:

> "1. Vessels built in or documented under the laws of the United States and later sold to foreign owners.
>
> 2. Vessels built in the United States for foreign countries or foreign purchasers."

S. Rep. No. 870, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 118, 74th Cong., 1st Sess. (1935). The WAPELLO, built in the United States for Panamanian purchasers, falls squarely within the four corners of the second example.[4]

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[4] Following the statement that vessels built in the United States for foreign purchasers are intended to be excluded by the proviso, both committee reports go on to state that the existing vessels falling within this class were built during or shortly after the First World War. Marine Carriers seizes upon this statement as the basis for its argument that the only vessels in that class intended to be excluded were those ships to which the reports made specific reference. We are unable to agree that a statute which speaks in general terms should not receive general application. When Congress intended a statute to apply only to a specific, existing class of ships, it has had no difficulty in expressing this intent. *See* 46 U.S.C. § 13 (ships owned by the United States prior to June 5, 1920 may participate in the coastwise trade regardless of where constructed).

In addition to the specific expression of congressional intent, Thomas E. Staken, Administrator of the Federal Maritime Administration, indicated in testimony before the Senate Merchant Marine and Fisheries Subcommittee in 1953 his interpretation of the first proviso "that no vessel that is built in the United States and is placed under foreign registry shall thereafter acquire the right to engage in the coastwise trade." In an effort to rebut this, Marine

(*footnote continued on following page*)

Appendix A

Not only the specific references contained in the committee reports but also the general purposes of the various provisions governing the admission of vessels to the coastwise trade strongly suggest that the WAPELLO should be excluded from this trade. These provisions are unabashedly protectionist. Their aims are to protect the American shipping industry already engaged in the coastwise trade, to provide work for American shipyards, and to improve and enhance the American merchant marine. See *Pennsylvania R.R.* v. *Dillon*, 335 F. 2d 292, 295 n. 5 (D. C. Cir. 1964); Merchant Marine Act of 1920, ch. 250, 41 Stat. 998 (preamble; S. Rep. No. 870, *supra;* H. R. Rep. No. 1947, *supra;* Morse, *A Study of American Merchant Marine Legislation*, 25 Law & Contemp. Prob. 57 (1960). To permit ships built in the United States for foreign owners, such as the WAPELLO, to participate in the coastwise trade upon resale to American owners could result in an excessive number of ships engaged in that trade to the prejudice of other American shippers. The depressing charter rates could be one by-product which Congress sought to avoid. Moreover, even if there should exist a need for additional ships

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(*footnote continued from previous page*)

Carriers directs our attention to 46 C.F.R. § 67.01—5(c). This regulation provides:

> "The following classes of vessels are entitled to receive marine documents under existing laws:
>
> (c) *Class 3.* Any vessel built in the United States in whole or in part for the account of one who is not a citizen and then recorded, which thereafter becomes wholly owned by a citizen and has never before been documented."

We do not believe this regulation is at all conclusive on the issue of the WAPELLO's eligibility for the coastwise trade, for "recorded" or "documented" may refer to either registration or enrollment. The regulation may say no more than that ships such as the WAPELLO may be registered American and engage in the foreign trade upon being returned to American ownership. In any event, even if it should have some applicability to enrollment, the regulation pales before the specific expressions of congressional intent.

in the coastwise trade, the statutory scheme seems to envision that this demand should be met by new construction in American shipyards. Finally, since ships in the position of the WAPELLO are not new ships but, on the contrary, have been sold at least twice, their admission to the coastwise trade is not likely to result in the improvement and modernization of the American Merchant Marine. In sum, we are of the view that the first proviso to section 27 must be interpreted as a coherent whole and that we must give recognition to the expressed intent of Congress, and the purposes of the statutory scheme. Accordingly, we are led to the conclusion that the WAPELLO could not engage in the coastwise trade.

III. *Eligibility of the* OBSERVER *for the Coastwise Trade*

Because our conclusion differs from Judge Tenney's on the WAPELLO's eligibility for the coastwise trade, we must reach the issue of whether on the issue of its eligibility for coastwise trade the OBSERVER is to be considered a new ship, a rebulit TRUSTCO, or a rebuilt SANTA HELENA.[5] One of

[5] The appellants contend that if we are to hold that the WAPELLO could not engage in coastwise trade, the OBSERVER must also be excluded under the first proviso. The theory urged seems to be that if the WAPELLO itself cannot participate in the coastwise trade, its forebody is fatally tainted and any ship of which this forebody is a part is forever barred from the coastwise trade. We discern a major flaw in this line of reasoning, however. The first proviso speaks of vessels, not of their component parts. Its effect is to exclude the WAPELLO as an entity. The statute governing the components which may be employed in rebuilding a vessel for the coastwise trade is the second proviso to section 27. *See* note 6 *infra*. This proviso requires only that "the construction of any major components of the hull or superstructure of the vessel [must be] effected within the United States"; there is no requirement that the components must be free from any taint arising out of a previous sale. It is undisputed that the construction of the WAPELLO's forebody was effected within the United States.

these three options—that the OBSERVER is an entirely new ship—we may eliminate from consideration at the outset. In all administrative determinations regarding the OBSERVER's right to participate in various aspects of the shipping trade, the United States Maritime Administration and the Bureau of Customs consistently referred to the OBSERVER as a rebulit ship. Moreover, to characterize the OBSERVER as a new vessel built in the United States for American owners which is consequently eligible for the coastwise trade, would enable shipowners to avoid our ruling that vessels with the WAPELLO's history should be excluded from the coastwise trade. If the OBSERVER were to be considered a new ship, a shipowner could easily purchase two ships ineligible for coastwise trade (like the WAPELLO), and attach the stern of each to the forebody of the other in American shipyards, making both progeny eligible for the coastwise trade. The effect of this process —two ships eligible for coastwise trade where before there were none—would be in direct conflict with the statutory purpose to protect the business of shippers already engaged in the coastwise trade. Although the joining process would have occasioned some work for American shipyards, the end result is not likely to bring about a marked improvement or modernization of the United States Merchant Marine.

There remain two avenues we may travel. First the OBSERVER may be characterized as a rebuilt SANTA HELENA. In such event, we have already set forth our reasons for its exclusion. The genealogy of the OBSERVER requires this conclusion. We have stated that the joining of the stern of one vessel to the forebody of another constitutes reconstruction of one of the contributing parents rather than the creation of a new vessel. The SANTA HELENA is itself either a rebuilt WAPELLO or a rebuilt ESSO CHITTAGONG. Since both of these vessels were sold to foreign owners after being built in the United States, they, and their off-

spring the SANTA HELENA, would be excluded from the coastwise trade under the first proviso to section 27. Were the OBSERVER to be considered a rebuilt SANTA HELENA, it would also be subject to the taint of the SANTA HELENA'S parentage. Furthermore, the second proviso to section 27, a provision relating specifically to rebuilt ships which was enacted in 1956 and amended in 1960, offers an alternative ground for the exclusion of the SANTA HELENA.[6] Act of July 14, 1956, Pub. L. No. 84-714, 70 Stat. 544; Act of July 5, 1960, Pub. L. No. 86-583, 74 Stat. 321. Under its terms, "no vessel . . . which has acquired the lawful right to engage in the coastwise trade, by virtue of being built in . . . the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding . . . is effected within the United States." Since the two parents of the SANTA HELENA, the WAPELLO and the Esso CHITTAGONG, had both acquired the lawful right to engage in the coastwise trade by being built in the United States, and since the rebuilding which spawned the SANTA HELENA was effected in Japan, this exclusionary clause of section 27 requires barring the SANTA HELENA and its progeny from coastwise trade.

Maritime transplants seem to present problems gratefully absent in the human variety. In the former we have considerable difficulty in distinguishing the donor from the

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[6] The second proviso to section 27, as amended 46 U.S.C. § 883, reads:

> "That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions. . . ."

donee. In the latter both are clearly identified. In any event, if the OBSERVER were to be considered a rebuilt TRUSTCO instead of a rebuilt SANTA HELENA, we are of the view that it would be eligible for coastwise trade. The TRUSTCO was American built and, throughout its existence, American owned. Accordingly, it never ran afoul of the first proviso to section 27. And, the rebuilding which produced the OBSERVER was in full accord with the strictures of the second proviso, since it was carried out in an American shipyard. Furthermore, as required by the second proviso, "the constructon of any major components of the hull or superstructure of the vessel," including the forebody which was originally the forebody of the WAPELLO, was also effected within the United States.[7]

Accordingly, the crucial factor in determining the OBSERVER's eligibility for the coastwise trade is whether it should be characterized as a rebuilt TRUSTCO or a rebuilt SANTA HELENA. Nothing in the rather sparse record before

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[7] As opposed to the admission of the WAPELLO, the admission of a rebuilt TRUSTCO to the coastwise trade would not be inconsistent with the purposes articulated for regulating this trade. Before being rebuilt, the TRUSTCO was enrolled in the coastwise trade; allowing it to be enrolled in a rebuilt form will not add to the number of ships engaged in that trade and, hence, will not create a danger of adverse competitive effects on other shippers. The increase in the TRUSTCO's carrying capacity by the addition of the WAPELLO's larger forebody to its stern means that the segment of the American Merchant Marine participating in the domestic trade will be improved by a larger and better ship. The attachment of the WAPELLO's forebody to the TRUSTCO's stern in a Baltimore shipyard occasioned work for American shipyards. It may be argued, of course, that allowing a rebuilt TRUSTCO to participate in the coastwise trade has actually withdrawn work from American shipyards by motivating Marine Carriers not to have an entirely new ship constructed. It is equally logical to suppose, however, that were a rebuilt TRUSTCO to be ineligible for the coastwise trade, Marine Carriers would have elected to preserve the TRUSTCO in its original, unimproved form, rather than incur the expense of constructing a completely new vessel.

us would lead us to conclude that this question is not a material issue of fact which requires trial. Without the benefit of expert testimony, we cannot judge the weight to be given to the fact urged upon us, that the SANTA HELENA's forebody comprises three-quarters of the OBSERVER's length but that the TRUSTCO's stern is by far the more valuable part of the OBSERVER. Moreover, the Bureau of Customs seems to have made inconsistent determinations as to the appropriate category into which the OBSERVER falls. The OBSERVER's temporary Certificate of Registry strongly suggests that the OBSERVER is to be considered a rebuilt TRUSTCO, reciting that the OBSERVER is a rebuilt ship originally constructed in 1943, the year of the TRUSTCO's construction. The Bureau of Customs, however, issued not only a temporary Certificate of Registry but also a new registration number. The TRUSTCO was registered as a United States vessel and, under 19 C.F.R. § 3.28 subd. C, a rebuilt vessel retains its registry number. The issuance of a new registration number therefore suggests that the OBSERVER was viewed as a rebuilt SANTA HELENA, a vessel which was not registered American and, consequently, could not have carried a registration number through the rebuilding process. Given the apparent inconsistency in these agency determinations, we are of the view that a trial could shed some light on the reasons for and meaning of the actions of the Bureau of Customs.

For all the reasons stated we reverse and remand for a trial.

APPENDIX B

Opinion, United States District Court, Southern District of New York.

67 Civ. 4167

MARINE CARRIERS CORPORATION,

Plaintiff,

against

HENRY H. FOWLER, individually, and as Secretary of the Treasury, LESTER D. JOHNSON, individually, and as Commissioner of Customs, ALAN STEPHENSON BOYD, individually, and as Secretary of Department of Transportation, WILLARD J. SMITH, individually, and as Commandant of U. S. Coast Guard, and the BUREAU OF CUSTOMS,

Defendants.

MEMORANDUM

TENNEY, J.

Plaintiff, a Delaware corporation, by amended complaint filed September 11, 1968 sought declaratory judgment pursuant to 28 U.S.C. § 2201, declaring it entitled to enroll its vessel, the "OBSERVER", in coastwise trade, and an injunction compelling defendants to so enroll it. Plaintiff, contending that there exists no genuine issue as to any material fact, has moved pursuant to Fed. R. Civ. P. 56 for an order granting summary judgment in its favor for the relief requested in its amended complaint. In opposition to this motion, defendants have similarly moved for summary judgment.

Appendix B

The complex but undisputed facts reveal the following.

Plaintiff's stock is owned solely by American citizens. The "OBSERVER," a vessel owned by plaintiff, was constructed by the joining of the forebody of the "SANTA HELENA" to the stern section of the "TRUSTCO", which joining was accomplished in an American shipyard. The "TRUSTCO" was an American-built vessel owned by plaintiff corporation and enrolled with authority to engage in coastwise trade. The forebody of the "SANTA HELENA" was originally the forebody of the "WAPELLO", an American-built vessel constructed for a Panamanian corporation. The "WAPELLO" was subsequently transferred to a Liberian corporation which severed the vessel's forebody and sold it to another foreign corporation. This last foreign corporation joined the "WAPELLO'S" forebody to the stern section of still another vessel, the result of which was the creation of the "SANTA HELENA".

On October 5, 1966, the Commissioner of Customs, in reply to a request for a ruling as to whether the "OBSERVER" would be eligible for enrollment in coastwise trade found that it would not be so eligible. The Assistant Secretary of the Treasury affirmed the Commissioner's ruling on October 27, 1966, and, on December 19th of the same year, affirmed his prior decision to adhere to the Commissioner's ruling. It is from these rulings that plaintiff seeks relief from this Court.

The requirements that a vessel must meet in order to engage in coastwise trade[1] are set forth in 46 U.S.C. §§ 11 and 252. Essentially, what is required is that the vessel be built in this country and be wholly owned by citizens of the United States. Section 883 of Title 46 of the United

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[1] Page 3. "Coastwise trade" is the privilege of engaging in commerce between points within the United States; that is, if a vessel is enrolled with the privilege of engaging in coastwise trade it may carry cargo from one domestic port to another.

States Code, which is is the central cause of dispute herein, in pertinent part provides that a vessel may not engage in coastwise trade unless it is:

> ". . . a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or [is a vessel] . . . to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title; *Provided,* That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade: *Provided further,* That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of being built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States. . . ."

The provisos in Section 883 were apparently designed to exclude certain vessels from engaging in coastwise trade. In ruling that the "OBSERVER" was so excluded, the Commissioner relied on the first proviso, finding that the placing of a vessel under foreign registry would thereafter preclude it from acquiring coastwise trading rights. To use the Commissioner's language: ". . . the WAPELLO acquired the right to engage in the coastwise trade by having been built in the United States and lost that right when

it was later placed under foreign registry.'"[2] In conclusion, the Commissioner noted that when part of a vessel that has lost the right to engage in coastwise trade is used in constructing another vessel, the resulting vessel is likewise ineligible for use in coastwise trade. Hence, because the "OBSERVER" consisted of the forebody of the "WAPELLO", the Commissioner found that it could not be enrolled for coastwise trading privileges.

In affirming the Commissioner's ruling and in response to plaintiff's claim that the first proviso of Section 883 was inapplicable to the "OBSERVER" because the "WAPELLO" had never acquired the right to engage in coastwise trade, the Assistant Secretary of the Treasury stated that the phrase "either by virtue of having been built in or documented under the laws of the United States" was controlling, as this part of the first proviso reflected Congressional intent to exclude vessels like the "OBSERVER"[3] from coastwise trade.

The issue, as developed from the record before me, is whether by virtue of any of the provisos of 46 U.S.C. § 883, the "OBSERVER" should be denied the right to enrollment under the flag of the United States.

Plaintiff's position, essentially, is that the "OBSERVER" is not disqualified by virtue of any of the provisos of Section 883 from obtaining coastwise trading privileges. The Government, on the other hand, relies on the previous determinations of the Commissioner of Customs and the Assistant Secretary of the Treasury, and insists that the legislative history of the first proviso of Section 883 clearly mandates the "OBSERVER's" exclusion from this privilege.

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[2] Page 4. Defendants' Exh. 1 at 2, attached to Affid. of Richard M. Hall (dated May 22, 1969).

[3] Page 5. Defendants' Exh. 2, attached to Affid. of Richard M. Hall (dated May 22, 1969).

Appendix B

The first proviso of Section 883 begins: "Provided that no vessel having at any time acquired the right to engage in coastwise trade." The clear and inescapable conclusion is that previous acquisition of coastwise trading privileges is a *sine qua non* to the proviso's application. In order for a vessel to come within its purview it must have once enjoyed the right to engage in coastwise trading and thereafter have been "sold foreign in whole or in part or placed under foreign registry." The "WAPELLO", which is the vessel claimed by the Commissioner to have once enjoyed coastwise trading privileges, in fact never did. The "WAPELLO" never acquired this privilege since it was never owned by citizens of this country; it was built for and delivered to a foreign corporation. It follows that if the "WAPELLO" does not fall under the axe of the first proviso, it cannot preclude the qualification of the "OBSERVER" for enrollment in coastwise trade.

The Government, contending that such a construction is inconsistent with the purpose as expressed in the history of the first proviso, has urged this Court to adopt a construction more consonant with legislative intent. But even assuming the validity of the Government's premise, since I do not find the proviso in question unclear it is wise to abide by the elementary rule of statutory construction that absent ambiguity a statute should be controlled by its literal language, without resort to legislative history. *United States* v. *Missouri Pac. R.R.*, 278 U. S. 269, 278 (1929); *Elm City Broadcasting Corp.* v. *United States*, 235 F. 2d 811, 816 (D. C. Cir. 1956). However, mindful of the import of this issue, I have examined the statute's history for evidence of Congressional intent.

Both House reports on the first proviso state that "The bill seeks to prevent the *renaturalization* of ships *formerly entitled to coastwise service* but which have lost that right

through foreign ownership.'"[4] (Emphasis supplied.) Additionally, an open letter to the Secretary of Commerce from J. C. Peacock, Special Assistant to the Director of the United States Shipping Board Bureau, reveals that "The effect of the proposed amendment [was] to exclude ex-American vessels, . . . from *again acquiring* the right to engage in the coastwise trade. . . ."[5] (Emphasis supplied.) Only a dictionary is needed to support the conclusion that reference to vessels "formerly entitled to coastwise service" necessarily assumes the previous possession of this right. Of course, similar reasoning is applicable with respect to reference made to vessels "again acquiring the right to engage in the coastwise trade." Consequently, I find that the first proviso was not intended to cover vessels that never had coastwise trading privileges.

Further, the legislative history of the first proviso indicates that it was specifically designed to exclude certain vessels of World War I vintage which were considered to have had only "nuisance value".[6] The "WAPELLO", having been constructed in 1953, and apparently of substantial value, is clearly outside the intended scope of the proviso. Moreover, in approving the first proviso Congress apparently intended to protect domestic maritime interests, such as American shipyards and the maritime labor market.[7] Both the "OBSERVER" and the "WAPELLO" have furthered these objectives. There is nothing "Un-american" about the construction of either vessel. It is undisputed that the "WAPELLO" was constructed in this country by a domestic shipbuilder and that the forebody

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[4] Page 7. S. Rep. No. 870, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 118, 74th Cong., 1st Sess. (1935).

[5] Page 8. *Id.*

[6] Page 8. *Id.*

[7] Page 8. *Id.*

of the "SANTA HELENA" (originally the forebody of the "WAPELLO") was joined to the stern of the "TRUSTCO" (an American-built vessel) in an American shipyard by American workers. Thus, after careful review of the legislative history, I find that Congress did not intend to exclude from coastwise trade vessels built in this country for foreign owners, which are subsequently reacquired by citizens of this country. It follows that the "OBSERVER" is not disqualified from engaging in coastwise trade under the first proviso to Section 883.

In reaching this conclusion, it should not be assumed that the Court has disregarded that portion of the first proviso which reads "by virtue of having been built in, or documented under the laws of the United States". Immediately preceding the first proviso reference is made to "vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title." Sections 13 and 808 permit certain foreign-built vessels to engage in coastwise trade provided they are documented under the laws of the United States and owned by citizens thereof. Consequently, in construing the first proviso, I find that the above-quoted language referring to domestic construction or documentation was merely included to indicate that no matter how a vessel originally acquired coastwise trading privileges it would come within the ambit of the first proviso; that is, the first proviso is equally applicable to vessels that originally acquired the right to engage in coastwise trade whether by domestic construction and ownership (Sections 11 and 252) or by domestic documentation and ownership of vessels built abroad. (Sections 13 and 808.)

If the first proviso were to be construed as the Government suggests, a vessel would be disqualified from engaging in coastwise trade merely by virtue of having been built in this country and then "sold foreign". This con-

struction would allow the phrase "by virtue of having been built in, or documented under the laws of the United States" to control the initial requirement of previous possession of coastwise trading rights. It seems anomalous to stress the descriptive phrasing of a statute to the point of ignoring a clear condition precedent to the statute's applicability. Logic dictates that such construction would be both injudicious and unwarranted, especially in view of the fact that a vessel does not acquire the right to engage in coastwise trade merely "by virtue of having been built in, or documented under the laws of the United States."

Under the facts of the instant case, it is equally possible to consider the "OBSERVER" a rebuilt vessel and, consequently, within the permissive scope of the second proviso to Section 883. Although the "OBSERVER" was given a new registration number, her Certificate of Registry refers to the year of the "TRUSTCO's" original construction and, in addition, the certificate indicates that the "OBSERVER" was "rebuilt" by the Bethlehem Steel Corporation.[8] Further, by letter of June 1, 1966, the Maritime Administration of the Department of Commerce, by its General Counsel, advised plaintiff that the "OBSERVER" will be a vessel rebuilt in the United States."[9]

Thus, if the "OBSERVER" is considered to be a rebuilt "TRUSTCO" it does qualify for coastwise trading privileges as "TRUSTCO" was originally entitled to such privileges and the entire rebuilding was done in the United States. This is all the second proviso requires for the continued enjoyment of the privilege of engaging in coastwise trade.

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[8] Page 11. Reply Affid. of Joseph Cardillo, Jr. (dated June 2, 1969) at 5.

[9] Page 11. Plaintiff's Exh. A at 2, attached to Reply Affid. of Joseph Cardillo, Jr. (dated June 2, 1969).

Accordingly, and for the foregoing reasons, plaintiff's motion for summary judgment is granted, and the Government's motion for summary judgment is denied.

Submit order on notice in accordance herewith.

Dated: New York, New York October 21, 1969.

CHARLES U. TENNEY,
U.S.D.J.

Ruling of the Bureau of Customs

(EMBLEM) (EMBLEM)

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
Washington

Oct 5 1966

Refer to MD 216.131 F

Joseph Cardillo, Jr., Esq.
29 Broadway
New York, New York 10006

Dear Mr. Cardillo:

Your letter of August 11, 1966, requested a ruling on behalf of Marine Carriers Corp., as to whether a proposed vessel, to be named the OBSERVER, which will be comprised of sections of the TRUSTCO (244131) and the SANTA HELENA would be eligible for coastwise privileges.

You state that your client proposes to acquire the forebody of a vessel named SANTA HELENA presently under Liberian registry. The SANTA HELENA is a vessel comprised of (1) the forebody of the former tanker WAPELLO, which was constructed in Chester, Pennsylvania, for the Brilliant Transportation Co., S.A., a Panamanian corporation, registered foreign, and later transferred to Iberian Tanker Company, a Liberian corporation, and (2) the stern section of the Panamanian tanker Esso CHITTAGONG (ex STANVAC DURBAN). The sections were joined in a Japanese yard and the resulting SANTA HELENA placed under the Liberian flag.

Upon acquisition of the forebody of the SANTA HELENA, your client proposes to join it to the stern section of the TRUSTCO and to insert, if required, a new American-built

section in order to properly fair in the stern section. The resulting vessel would be renamed the OBSERVER. All the above-described work of the conversion would be done in a United States shipyard.

The first proviso to section 883, title 46, United States Code, is as follows:

> Provided, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade. . . .

It is your view that this proviso is not applicable. You contend that while the WAPELLO was built in the United States, it never acquired the lawful right to engage in the coastwise trade as it was delivered by the shipyard to a foreign corporation and could not be documented as a vessel of the United States by the foreign owner.

Under the construction of the proviso which you advocate, no purpose or effect appears to be given to the words, "either by virtue of having been built in * * * the United States." It is a basic rule of statutory construction that, if possible, signficance and effect should be given every word of a statute. (*Carey & Skinner, Inc.* v. *United States,* 42 C.C.P.A. 86, *Ex Parte Public Bank,* 278 U. S. 101).

The proviso itself specifies two methods by which a vessel may have acquired the right to engage in the coastwise trade, and certain events, a sale foreign or the placing of the vessel under foreign registry, which, should either occur, would preclude the vessel from thereafter acquiring the right to engage in the coastwise trade. Applying the

proviso to the facts submitted, the WAPELLO acquired the right to engage in the coastwise trade by having been built in the United States and lost that right when it was later placed under foreign registry.

The Bureau has ruled that where a part of a vessel without coastwise privileges is used in the rebuilding of a vessel, the resulting vessel is not eligible to be used in the coastwise trade. Accordingly, the resulting vessel comprised of a portion of the SANTA HELENA and the TRUSTCO will not be eligible to engage in the coastwise trade since a portion of the resulting vessel has lost its right to engage in the coastwise trade.

Sincerely yours,

RUTH W. JOHN
Commissioner of Customs

Ruling of the Treasury Department

TREASURY DEPARTMENT

Washington, D. C. 20220

(EMBLEM)
Assistant Secretary

Oct 27 1966

MTR 3-111834
216.131 McD

Dear Mr. Cardillo:

We have looked into the matter of the OBSERVER, the subject of your letter of October 14.

The OBSERVER is a vessel resulting from the joining of the stern of the American-flag TRUSTCO and the forebody of the Liberian SANTA HELENA. The forebody of the SANTA HELENA was formerly a part of the WAPELLO, a vessel built in the United States for foreign account and placed under foreign flag. The Commissioner of Customs has ruled that the OBSERVER is not eligible for coastwise trade because the first proviso of section 883, title 46, United States Code, prohibits a vessel which has at any time acquired the right to engage in the coastwise trade, "either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry," from thereafter acquiring the right to engage in the coastwise trade.

You contend that though built in the United States the WAPELLO had never acquired the right to engage in coastwise trade as she could not have been lawfully so used by her foreign owners and that the proviso is not applicable.

To rule as you have asked would require that we ignore the words "either by virtue of having been built in, or documented under the laws of the United States." We do not believe that this can be done as it appears that the sole

reason for use of this language in the law was to describe or explain exactly what vessels the Congress had in mind.

We must, therefore, agree with the Commissioner's conclusion that the OBSERVER is prohibited from engaging in the coastwise trade by the proviso to section 883.

Sincerely yours,

True Davis

Joseph Cardillo, Jr., Esq.
29 Broadway
New York, New York 10006

Ruling of the Treasury Department Upon Request for Reconsideration

TREASURY DEPARTMENT

Washington, D. C. 20220

(EMBLEM)
Assistant Secretary

Dec 19 1966

MTR-3-111834
216.131 F

Dear Mr. Cardillo:

Your letter of November 22, 1966, requested reconsideration of our decision of October 27, 1966, agreeing with the conclusion of the Commissioner of Customs that the OBSERVER is prohibited from engaging in the coastwise trade by the first proviso to section 883 of title 46, United States Code.

We have carefully considered the issues you have raised in your letter and again have reviewed the law and the facts in this case, but we find no basis for taking any action other than to affirm our previous decision that the OBSERVER is ineligible to engage in the coastwise trade.

Sincerely yours,

True Davis

Joseph Cardillo, Jr., Esq.
29 Broadway
New York, New York 10006

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 885

MARINE CARRIERS CORPORATION, PETITIONER

v.

HENRY H. FOWLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 37-45) is reported at 305 F. Supp. 984. The opinion of the court of appeals (Pet. App. 21-36) is reported at 429 F. 2d 702.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1970, and timely petitions for rehearing were denied on July 27, 1970 and August 13, 1970.

The petition for a writ of certiorari was filed on October 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a ship created in the United States by joining the stern section from a United States ship to the forebody of a foreign ship qualifies for coastwise trading when the forebody was originally constructed in the United States for a foreign corporation.

STATUTE INVOLVED

The relevant portion of Section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. 883, provides:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: *Provided*, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry,

shall hereafter acquire the right to engage in the coastwise trade * * *.

STATEMENT

Petitioner commenced this action to secure a declaratory judgment that its tanker, the OBSERVER, is entitled to enrollment in the coastwise trade, that is, between points within the United States. Petitioner also sought an injunction ordering respondents to enroll the OBSERVER (Pet. App. 37).

The OBSERVER was created in a United States shipyard by joining the forebody of a Liberian tanker, the SANTA HELENA, to the stern of an American tanker, the TRUSTCO (Pet. App. 23-24). The TRUSTCO had been built in the United States and enrolled in the coastwise trade (Pet. App. 24). The SANTA HELENA was herself a composite. Her forebody was originally part of the WAPELLO, which had been built in the United States for a Panamanian corporation (Pet. App. 38). Subsequently, the forebody of the WAPELLO was transferred to a Liberian corporation and joined in a Japanese shipyard to the stern section of the ESSO CHITTAGONG, a United States-built Panamanian tanker, to form the SANTA HELENA (Pet. App. 23, 38). The SANTA HELENA was then registered under the law of Liberia.

Thus, each of the two sections forming the OBSERVER had been built in the United States, but neither of the two previous ships containing the OBSERVER's forebody had been owned by a United States citizen, registered under United States law, or enrolled in the coastwise trade (Pet. App. 23-24, 35, 41).

The Commissioner of Customs denied petitioner's request for coastwise privileges for the OBSERVER (Pet. App. 46-48). The OBSERVER was then registered as a United States ship but banned from coastwise trading (Pet. App. 25). The Assistant Secretary of the Treasury upheld this prohibition (Pet. App. 49, 51). Petitioner then commenced this action in the United States District Court for the Southern District of New York. Both sides moved for summary judgment. In granting petitioner's motion, the court held that the OBSERVER is entitled to coastwise trading privileges and ordered respondents to approve documentation for such privileges (Pet. App. 37-45).

The court of appeals reversed. It held that the OBSERVER's eligibility for coastwise privileges depends on whether the ship should be characterized as a rebuilt TRUSTCO or a rebuilt SANTA HELENA (Pet. App. 35) and remanded for a trial on this issue. If the OBSERVER is found to be the TRUSTCO rebuilt, she will be eligible, the court of appeals ruled, because the TRUSTCO had been eligible and because the rebuilding had been performed within the United States (Pet. App. 35). If she is found to be the SANTA HELENA rebuilt, however, the OBSERVER must be excluded under the decision below because the SANTA HELENA was held excludable on alternative grounds (Pet. App. 33-34). Regarded as a rebuild of either the WAPELLO or the ESSO CHITTAGONG, the Liberian SANTA HELENA was found ineligible under the first proviso to 46 U.S.C. 883 because both prior

vessels had been built in the United States and sold to a foreigner (Pet. App. 33-34).[1] The court also found the SANTA HELENA excludable under the second proviso to 46 U.S.C. 883 because the rebuilding which produced her occurred in Japan (Pet. App. 34).

ARGUMENT

This case does not warrant review by this Court. No conflict in decisions exists on the narrow question of limited significance presented by petitioner. Moreover, the court of appeals correctly rejected petitioner's construction of the first proviso to 46 U.S.C. 883.

1. The criteria for enrollment in the coastwise trade are set forth in 46 U.S.C. 11, 13, 252, 808 and 883. Sections 11 and 252 enable vessels built in the United States and wholly owned by a United States citizen to be enrolled. A foreign-built vessel can qualify only if it was owned by United States citizens in 1920 (Section 13) or has been obtained from the Secretary of Commerce and thereafter continuously owned by United States citizens (Section 808). Once registered under foreign law or sold to a foreigner, a ship loses its eligibility forever (Section 883).

Petitioner concedes that the decision below is the only appellate holding on the issue presented in the thirty-five years since enactment of the first proviso to 46 U.S.C. 883 (Pet. 14). Indeed, the question of the OBSERVER's eligibility for coastwise trading arises

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[1] The ESSO CHITTAGONG forfeited its coastwise privileges even under petitioner's construction of the first proviso because she was constructed in the United States for a United States citizen, registered as a United States ship, then sold and registered foreign.

only because the ship (1) is owned by a United States citizen and (2) documented under United States law, and (3) was produced in the United States by the joining of (4) the stern of an American ship (5) to the forebody of a foreign vessel, but (6) that forebody had originally been built in the United States (7) for a foreign owner. A change in any of these seven factors would decisively alter the issue of the OBSERVER's eligibility. Since only the most peculiar and complex genealogy of the vessel involved here gives rise to this controversy, the decision below affects the coastwise privileges of an extremely restricted class of ships.

2. The court of appeals correctly resolved this narrow question of limited significance against petitioner. Contrary to petitioner's claim (Pet. 18), the language of the first proviso is not clear and unambiguous. The district court and the court of appeals reached opposite results in construing the following language: "having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part * * *." The district court, emphasizing the first phrase, held that "previous acquisition of coastwise trading privileges is a *sine qua non* to the proviso's application" (Pet. App. 41). Of course, if this construction were correct, the OBSERVER would not be barred because the ship that contributed her forebody—the WAPELLO—would not come within the proviso. As the court of appeals noted, however, the second phrase of the proviso seems to indicate that

the proviso "applies to all vessels sold foreign after having been built in the United States" (Pet. App. 28), which would include the WAPELLO.

Faced with this "inartful wording" (Pet. App. 27), the court of appeals properly resolved the ambiguity by interpreting the first proviso to bar those vessels that provided the OBSERVER's forebody. First, under petitioner's reading of the first proviso (Pet. 15-16), a United States-built vessel would not be barred if it had been sold originally to a foreigner, but would be excluded if it had been built for an American and then sold to the foreigner. As the court of appeals stated (Pet. App. 28 n.3), there is no "reason in logic or policy why these two classes of ships should be treated differently."

Second, the statutory policy of the coastwise trading provisions, which the court of appeals recognized as "unabashedly protectionist" (Pet. App. 31), militates against enrolling the OBSERVER. "The principle aim of [the first proviso] was to encourage resort to American shipyards by preventing cheap purchase of ships which previously had been sold to a foreign buyer." *Pennsylvania R.R. Co.* v. *Dillon*, 335 F. 2d 292, 295 n. 5 (C.A.D.C.), certiorari denied, 379 U.S. 945. This aim would be frustrated if a ship containing the forebody of a Liberian tanker were granted coastwise privileges.[3]

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[3] Indeed, in its petition for rehearing in the court of appeals, the government argued that this clear statutory policy requires the OBSERVER to be held ineligible because a significant portion of the ship is ineligible, regardless of whether the resulting vessel is characterized as the TRUSTCO rebuilt or the SANTA HELENA rebuilt.

Third, the legislative history indicates Congress' intention that the first proviso exclude vessels precisely like the WAPELLO, which supplied the OBSERVER's forebody. Both committee reports recommending enactment of the proviso state that it:

> will prohibit the following classes of vessels from engaging in the coastwise trade:
>
> 1. Vessels built in or documented under the laws of the United States and later sold to foreign owners.
> 2. Vessels built in the United States for foreign countries or foreign purchasers. * * *

S. Rep. No. 870, 74th Cong., 1st Sess. 2; H. Rep. No. 118, 74th Cong., 1st Sess. 2. Since the WAPELLO is squarely within the second category, the committee reports simply "could not have been more specific" (Pet. App. 30).

Finally, in accordance with this legislative history, the administrative interpretation of the first proviso has long been that "no vessel that [such as the WAPELLO] is built in the United States and is placed under foreign registry shall thereafter acquire the right to engage in the coastwise trade." Testimony of Thomas E. Stakem, Administrator of the Federal Maritime Administration, Hearings on S. 1627 Before the Senate Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, 87th Cong., 1st Sess. 78.

The rejection of petitioner's construction of the first proviso by the court of appeals is, therefore, amply supported.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
ANTHONY J. STEINMEYER,
Attorneys.

DECEMBER 1970.

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